IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-727

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA), *Petitioner*

*v.*

CLARE IMMACULATA KENNY, *Respondent*

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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## TABLE OF CITATIONS

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## PETITIONER'S REPLY ARGUMENT

The arguments contained in the Petition for Certiorari and the Respondent's brief in opposition thereto illustrate the need for this Court to further define the *Erie* doctrine.

The Respondent, like the Court of Appeals below, contends that a public carrier may be held liable in Pennsylvania for an attack on one of its passengers even though:

1. That attacker did nothing to forwarn the carrier's agents of his intent and,

2. The site of the attack had no past history of such attacks.

This argument is not based upon substantive Pennsylvania law dealing with the duty of public carriers to protect their passengers. Controlling Pennsylvania law would impose no liability in the case at bar. Rather it is based on inapposite decisions of Pennsylvania Courts defining the duty of owners of premises open for business. The decision by the Third Circuit is a prime example of a Federal Court improperly substituting its judgment for what the controlling state substantive law should be, declaring that to be the law and disregarding state law with which it disagrees.

The Third Circuit below has held Petitioner SEPTA liable for an attack on one of its passengers in a case where no liability should have been imposed under governing State law. Granting review in the instant case would therefore provide this Court with a significant opportunity to provide lower federal courts with principles to follow in identifying controlling State case law.

As stated in the Petition, the most sound Rule which could be enunciated in the instant case would be that Federal Courts should rely on State Court decisions arising from the most analogous set of facts. This not only would have been an especially appropriate easy Rule in the instant case but sound in logic and judicial administration. The Pennsylvania Supreme Court decision in *Kerns v. Pennsylvania R. R. Co.*, 366 Pa. 477, 77 A.2d 381 (1951), and the Pennsylvania Superior Court ruling in *Pollock v. Septa*, 228 Pa. Superior Ct. 911, 322 A.2d 672, *aff'g* 61 D & C 2d 711 (1972), both held under facts almost identical to the instant case that a public carrier could not be held liable for unpredictable attacks upon passengers by third parties absent a showing of a past pattern of attacks on the locale involved. *See also Mangini v. Septa*, 235 Pa. Superior Ct., 472, 482, 344 A.2d 621 (1975). The same Rule should obviously have been applied herein.

The Respondent's brief avoids the issue presented, and argues instead that liability should be imposed despite the absence of any indication that the attacker would strike or that the station involved had a history of attacks. The Respondent marshals her argument around the Restatement of Torts and Pennsylvania cases imposing liability on "Owners of premises open for business" for the unexpected tortious conduct of third parties. *See Moran v. Valley Forge Drive-In Theatre, Inc.*, 431 Pa. 432, 246 A.2d 875 (1968); *Morgan v. Bucks Associates*, 428 F. Supp. 546 (E. D. Pa. 1977).

These cases have imposed a broader duty to protect patrons than have the cases dealing with carriers. In



*Moran* and *Morgan*, the defendant business owners' liability was grounded upon their failure to employ adequate security personnel where they knew of repeated prior episodes of dangerous conduct on the part of mischievous vandals. The Respondent's brief refers to SEPTA as an owner of premises open for business so as to visit upon the carrier a duty not before thrust onto it by any Pennsylvania Appellate Court decision appropriate for application in this case.

However, calling SEPTA a business establishment doesn't make it so, and the Pennsylvania cases dealing with carriers such as SEPTA have not imposed the broader duties owed by such establishments.

There is a sound basis for the distinction between owners of premises "open for business" and "common carriers" which is maintained under Pennsylvania law. Where a business owner has invited the plaintiff upon his premises for his pecuniary benefit, and where those business premises are geographically discreet, it may not be unreasonable to impose some affirmative duty upon the owner to provide protection for those customer-plaintiffs even absent a past history of attacks. SEPTA, however, is not a "business establishment", in this sense. It is a public transit authority. SEPTA does not have one location to protect, it has hundreds of buses, trains and stations to maintain. SEPTA does not invite its passengers for the purpose of earning profits, SEPTA is a public authority created by the Pennsylvania legislature to serve the public's transit needs when private carriers could no longer afford to do so.

Throughout her brief, the Respondent criticizes SEPTA for a "do nothing" attitude toward passenger security. This criticism is misplaced since SEPTA, as a public agency, cannot do anymore than its legislative grant authorizes it to do. SEPTA is authorized and funded only to operate transportation lines.

Ironically, the City of Philadelphia, which has the duty and authority to provide protection for SEPTA passengers

was found to be without liability in this case—a verdict to which the Respondent took no exception or appeal.

It is plain from the recent decisions of Pennsylvania Courts in *Pollock v. Septa, supra,* and *Romisher v. Septa,* 65 Pa. D & C 2d. 483 (1974) that the broad duty owed to business visitors is not applicable to SEPTA. It is equally clear from those decisions, when contrasted with the decision of the Third Circuit below, that litigants in Pennsylvania are now motivated to "shop" for the Federal forum when they want to sue SEPTA. No matter how forcefully the Respondents may contend that *Kenney v. Septa* is consistent with the "trend" of Pennsylvania law, it is obvious that potential passenger-plaintiffs will find its precedential value in Federal Courts much more agreeable than *Kerns, supra,* and *Pollock, supra,* in the State Court system.

Granting Certiorari will not only eliminate that problem in Pennsylvania, but will guide other Federal Courts from creating separate bodies of law when they ignore State Court decisions arising from the most similar facts.

It is not the function of a Federal Court in a diversity case to ignore substantive state law with which it does not agree. And, as here, the action of a Federal Court supplanting controlling local substantive law with its opinion of what that law *should be* is action inimical to the Federal system.

Respectfully submitted,

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